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No. 06-1264

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

HONG YING GAO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

CAROLE NEVILLE
Counsel of Record

MICHAEL ROBERT CARNEY
Attorney

SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the court of appeals err in holding, after the resolution of the issue by the immigration judge and summary affirmance by the Board of Immigration Appeals, that women sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable constitute a "particular social group?"

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-18a) is reported at 440 F.3d 62. The order of the Board of Immigration Appeals (BIA) (Pet. App. 19a) summarily affirming the decision of the Immigration Judge (IJ) and the oral decision of the IJ (Pet. App. 20a-26a) are unreported.

JURISDICTION

The Second Circuit entered its judgment on March 3, 2006. A petition for rehearing was denied on October 19, 2006. Pet. App. 27a-28a. The petition for a writ of certiorari (Petition) was filed on March 15, 2007. On April 12, 2007, the time within which the Respondent, Hong Ying Gao, was permitted to file a response to the petition for writ of certiorari was extended to and including June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

SUMMARY OF THE OPPOSITION TO THE PETITION

In order to convince this Court to review and reverse the Second Circuit decision, the Petitioner manufactures a conflict between the decision of the court of appeals and *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*). *Ventura* and *Thomas* stand for the principle that remand is ordinarily required by a court of appeals when the

agency has not addressed in the first instance an issue that the asylum statute places primarily in the agency's hands. *Ventura*, 537 U.S. at 16 (remand necessary because the agency had not considered changed circumstances); *Thomas*, 126 S.Ct. at 1615 (remand necessary because the agency considered a claim for asylum based upon social and political views, not based upon membership of a particular social group). In the Respondent's case, by contrast, the Second Circuit reviewed a legal issue – the definition of a particular social group within the meaning of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A) – that had been presented to and expressly considered by the agency. In addition, the Second Circuit remanded Gao's asylum petition to the BIA for further proceedings consistent with its rulings on this and other asylum requirements to make the ultimate asylum eligibility determination. The Second Circuit's exercise of authority is consistent with the statute governing judicial review (8 U.S.C. 1252), this Court's *Ventura* and *Thomas* decisions, other courts of appeals, and agency precedent. As the decision of the Second Circuit does not conflict with any decision of this Court or any other court of appeals, further review on the ground of a so-called "failure-to-remand" error (Pet. 23) is not warranted.

The central premise of the Petition is that there is some distinction between a non-consensual brokered marriage arrangement condoned by the local authorities, which was how Gao's counsel framed the request for asylum in her appeal to the BIA[1] and to the IJ below, and

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[1] As the Petition acknowledges, Gao argued that she was persecuted on account of her membership in a particular social group composed of "'young women of Fuchow ethnicity, who have not [*sic*] had traditional

(Continued on following page)

"forced marriage," the term used by the Second Circuit. Based on that semantic distinction (not the record taken in its entirety, the legal arguments made by the Respondent to the IJ and BIA, or widely accepted definitions of "forced" versus "arranged" marriages), the Petitioner argues that (i) the formulation of the particular social group adopted by the Second Circuit was neither presented to nor addressed by the agency (*id.* at 2), and (ii) the decision will have the widespread effect of granting refugee status based upon membership in a protected social group to participants in sixty percent of the world's marriages, *id.* at 3-4. The Petitioner's contentions do not stand on their merits upon close examination.

First, the Second Circuit's formulation of Gao's particular social group – "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable" (Pet. App. 14a) – is soundly based in the administrative record and the arguments of the Respondent's counsel below. Gao's testimony, which the IJ found credible, and the corroborating documents duly admitted into the record compel the conclusion that Gao remains bound to a forced marriage, not a classic arranged marriage. The testimony also established that Gao was sold into marriage to a man found for her family by a go-between for little more than $2000, which sum her family used to pay its debts. The record supports the Second Circuit's conclusion that this

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marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it.' Gao BIA Br. 6-7 (Admin. R. 10-11)." Pet. 9.

arrangement is condoned in rural China. Accordingly, notwithstanding the Respondent's occasional use of the words "arranged" or "arrangement," the record of this case substantiates the Second Circuit's formulation of the arrangement as a "forced" marriage as that term is used by the very sources relied upon by the Petitioner. See 7 Department of State, *Foreign Affairs Manual* § 1459(c) (2005).

Second, the Petitioner's prediction that the decision will open the floodgates to millions of "aliens (women in arranged marriages) entitled to seek asylum" (Pet. 12) has not materialized. The few circuit courts, including the Second Circuit, that have been asked to consider the formulation of a particular social group in the *Gao* decision recognize that the decision rests on the unique facts of the case. The circuit courts continue to require applicants for asylum to prove each requirement for eligibility before the IJ or BIA on a case-by-case basis – before either remanding the matter to the agency for further consideration or denying review of the agency's determination. In sum, there is no pressing need for this Court to review, let alone reverse, the Second Circuit decision based upon an important new issue of law or an alleged effect on immigration law and policy.

As more fully discussed herein, no genuine or intolerable conflict between the Second Circuit decision and this Court's decisions in *Ventura* and *Thomas* or any other ground for granting a writ of certiorari under Supreme

Court Rule 10 exists.[2] Accordingly, the Petition should be denied.

STATEMENT OF FACTS

The undisputed facts are fully set forth in the decision of the Second Circuit. Pet. App. 2a-4a. The facts in the record are reviewed herein solely to address the Petitioner's contention that the Second Circuit "defied the record before the agency" and "framed the social group it identified in terms that had not been argued to, let alone considered by, the agency." Pet. 16.

On January 24, 2003, Gao appeared before the IJ and testified in support of her application.[3] The IJ found Gao to be a credible witness. Pet. App. 24a. Given the full evidentiary weight, the Respondent's testimony should be deemed sufficient to establish the following facts as

[2] As the late Chief Justice Rehnquist noted, "[t]he function of the Supreme Court is * * * to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting), *quoting* Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949. None of the circumstances Chief Justice Rehnquist noted above are present here.

[3] Reference is made herein to (i) the January 24, 2003 hearing, which appears in the administrative record on pages 48-83; (ii) Gao's brief on appeal to the BIA, which appears in the administrative record on pages 5-17; and (iii) a letter to the IJ from Gao's mother, which appears in the administrative record on pages 104-105. These documents are attached hereto as Appendices A, B, and C, respectively, and are referred to herein as "App."

corroborated by supporting documents that were duly admitted into evidence without objection.

1. Respondent Was Sold Into A Forced Marriage.

In her testimony, Gao clearly and unequivocally framed her request for asylum as a woman who was being forced into marriage. In response to the IJ's first direct question regarding the basis for her asylum petition, "Why do you want to apply for political asylum?," Gao replied: "Because I was forced by the other people to get married. And then the other people wanted to sue me. So I came to the United States." App., *infra*, 13a.

The record in the *Gao* case compels the conclusion that Gao remains bound to a coerced, non-consensual marriage or forced marriage, and not merely an arranged marriage. The administrative record shows that the marriage agreement was entered into without Gao's consent from the beginning, *id.* at 14a ("At first I did not like too much about the engagement. But after being berated by my family members I stated [*sic*] to get along with the person"). Then, when the man to whom Gao was sold gambled and beat her because she refused to give him money, she opposed the marriage, *id.* at 15a ("I didn't want to marry this person"). See also *ibid.* ("And so I really didn't want the relationship to continue. I didn't want to marry."); *id.* at 16a ("So, he spoke to my family members and forced me to marry him."); *id.* at 17a (" . . . I really didn't want to marry him").

Once the agreement was reached between Gao's family and Chen Zhi (Zhi), the man who was introduced to the family by a go-between, Zhi paid Gao's family 18,880 RMB (approximately $2,250) for the right to marry Gao on

her twenty-first birthday. Pet. App. 22a. Gao's mother paid the broker 500 RMB for his services. *Ibid.*

2. The Practice Is Condoned In Rural China.

Gao testified that Zhi was introduced to her family members by a go-between, who went everywhere in the rural area "to match boys and girls." App., *infra*, 21a.

The record includes the 2001 State Department Country Reports on Human Rights Practices in China which, as the Second Circuit noted, indicated that there was "widespread domestic violence and trafficking in brides and prostitutes" (Pet. App. 3a-4a), fueled by gender imbalance, more prevalent in rural areas, and efforts to change the practice are actively resisted by village authorities. Pet. App. 4a; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China-Country Reports on Human Rights Practices-2001* (Mar. 4, 2002).

In addition, in Gao's brief on appeal to the BIA, Respondent referred to the fact that the government does not interfere with this kind of traditional arrangement. App., *infra*, 41a.

3. The Chinese Government Would Not Protect Gao.

When Gao was asked whether she ever went to the police or authorities to ask for help, she answered simply "I did not because I dare not." App., *infra*, 25a. Gao's belief that she would not be protected by the Chinese government was based partly on the fact that the government does not interfere with this kind of arrangement (*id.* at

41a) and partly on the fact that Zhi's paternal uncle was a prominent figure and an official in the local government.

Zhi threatened that if the Respondent refused to marry him, his uncle, a powerful local official, would sue her family. *Id.* at 17a; 22a-23a. The corroborating letter to the IJ from Gao's mother stated that Zhi threatened that he would use his powerful and rich uncle, who was an official in the government, to arrest her daughter. *Id.* at 46a-47a.

The questioning of Gao at the January 24, 2003 hearing and the IJ's resulting oral decision reflect an improper personal or cultural predisposition on the part of both the IJ and counsel for the agency.[4] Counsel for the

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[4] Notwithstanding the agency's substantial expertise in certain immigration matters, a number of courts have vacated factual findings and legal conclusions influenced by impermissible factors like cultural bias, personal beliefs and ideas or unfamiliarity with the applicant's country's legal, political, religious or social system. See, *e.g.*, *Jiang v. Gonzales*, 2007 WL 1394551, at *2-3 (7th Cir. May 14, 2007) (overturning IJ's adverse credibility determination where IJ impermissibly relied on "personal beliefs" and "perceived common knowledge" in concluding that refugee's alleged "rudimentary" knowledge of Christianity denoted refugee was not a true believer); *Kantoni v. Gonzales*, 461 F.3d 894, 897 (7th Cir. 2006) (vacating decision of IJ where IJ found otherwise credible asylum seeker's claims without merit based upon IJ's uninformed beliefs about political culture in asylum seeker's home country: "[i]f immigration judges want to base their findings on insights into the political or military or social culture of the asylum seeker's country . . . they must indicate a knowledge of the culture."); *Zhang v. Bureau of Citizenship & Immigration Servs.*, 201 Fed. Appx. 60, 64 (2d Cir. 2006) (finding IJ's findings of fact erroneous where IJ dismissed petitioners' explanation regarding apparently conflicting documentation simply because such explanation conflicted with IJ's personal experience); *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) (vacating IJ's decision as "unreasoned," noting "[a] lack of familiarity with relevant foreign cultures" is a "disturbing feature" that "bulk large in the immigration cases that we are seeing"); *Yi-Tu Lian v. Ashcroft*, 379 F.3d 457, 459

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agency, for example, referred to Zhi no fewer than ten times as Gao's "boyfriend" until he corrected himself and asked for the name of the man that Gao's mother arranged for her to marry. App., *infra*, 28a. Notwithstanding counsel's correction, the IJ continued to refer to Zhi as Gao's "boyfriend" in her decision. Pet. App. 25a. The agency representative also sought documentary evidence of the arrangement – the marriage agreement and the transfer of money, although it was clear from Respondent's answers that such documentation would not and does not exist in that region. App., *infra*, 21a. Finally, both the IJ and the agency described the facts of the terms familiar in the United States as a legal dispute over a broken contract or financial arrangement. See Pet. App. 25a; App., *infra*, 37a ("[Gao's] main concern in her testimony was that the family was going to sue because of the financial arrangement, which is a civil remedy open to the family because they didn't follow through with this arrangement."). In sum, the agency's views on the relationships of the parties, the nature of the arrangement, and remedies available

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(7th Cir. 2004) (rebuking immigration judge for making erroneous and conclusory pronouncements of Chinese law where immigration judge demonstrated obvious lack of knowledge thereof, noting that "[o]ur immigration judges are, or at least ought to be, knowledgeable about foreign countries – at the very least they should know how to find the answers to elementary questions of foreign law."); *Barapind v. Rogers*, 1997 WL 267881, at *3 (9th Cir. May 15, 1997) (finding that inferences based on nothing other than IJ's own cultural biases constituted a "string of zeros" and was unsupported by substantial evidence). *See also Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1496 (C.D. Cal. 1988) (permanently enjoining certain INS policies, finding that "[t]he impressions of INS agents and officials that Salvadorans come to the United States solely for economic gain reflect a lack of sensitivity and understanding and derive from ignorance on the part of INS agents as to the complex motivations and situations of those who have fled El Salvador.").

explain the conversion of the history of a young woman in rural China, sold into an abusive forced marriage, into a garden variety dispute over money between two families.

ARGUMENT

1. The Second Circuit Decision Is A Valid Exercise Of The Circuit Courts' Statutory Mandate.

Congress authorized direct review of questions of law in final agency determinations by the circuit courts. 8 U.S.C. 1252. The standard of review universally applied by the circuit courts with respect to legal conclusions, application of law to the facts and mixed questions of law and fact by the agency is *de novo* review. On review, in the proper exercise of judicial authority the circuit court may vacate the agency finding, provide the correct formulation of the legal principle or standard, and then remand to the BIA for further proceedings consistent with the decision. See, *e.g.*, *Himanje v. Gonzales*, 184 Fed. Appx. 105, 107 (2d Cir. 2006) (vacating the BIA's finding as erroneous that credible petitioner could not, as a matter of law, establish membership in "a particular social group," and remanding to the BIA for further proceedings consistent with order); *Niftaliev v. U.S. Attorney General*, ___ F.3d ___, 2007 WL 1514175, at *4-5 (11th Cir. May 25, 2007) (reversing the erroneous ruling of the BIA on the issue of past persecution, affording the petitioner the benefit of the rebuttable presumption described in 8 C.F.R. § 208.16, and remanding to the BIA for proceedings consistent with the opinion); *Gonzalez-Maldonado v. Gonzales*, ___ F.3d ___, 2007 WL 1518661, at *4 (5th Cir. May 25, 2007) (vacating determination that misstatements about residing in California running afoul of 8 U.S.C. 1101(f)(6) and remanding for

further consideration); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 *passim* (9th Cir. 2005) (vacating the IJ's finding that petitioner's harm was not linked to his political opinion). The Second Circuit's review in the *Gao* case is consistent with the court's statutory authority and the circuit courts in scope of review and substantative law. The IJ's legal conclusion, summarily affirmed by the BIA, that Respondent failed to qualify as a member of the particular social group identified by the Respondent was properly the subject of judicial review by the Second Circuit in accordance with the standard practices and procedures followed by federal courts of appeals.

The Petitioner argues, however, that the Court of Appeals committed what it calls the "failure-to-remand" error (Pet. 23) based upon this Court's decisions *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*). To fit the Second Circuit's decision into the holdings of *Ventura* and *Thomas* as a case where the circuit court decided an issue in the first instance, Petitioner claims that the IJ presented only the question of whether Gao was a member of a social group of women in "arranged" marriages, not a social group of Chinese women who have been sold into "forced" marriages. The entire argument rests on an artificial, purely semantic distinction between a non-consensual arranged marriage condoned by the local authorities, as Respondent's counsel framed the request for asylum in her appeal to the BIA and to the IJ below, and the term "forced" marriage adopted by the Second Circuit.

Petitioner cites a State Department publication to support its distinction between arranged and forced

marriages. But the definitions used by the State Department applied to the administrative record in this case actually demonstrate that Gao considered and described herself to the IJ as a victim of a forced marriage. The State Department in its *Foreign Affairs Manual* (Pet. 20) defines "arranged marriage" as one in which "the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals." 7 Department of State, *Foreign Affairs Manual* § 1459(b) (2005). In contrast, the State Department defines "forced marriage" as one in which "at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present." *Id.* at § 1459(c).[5] These widely adopted definitions rebut the Petitioner's position here that the issue of whether (i) Gao fell into a particular social group was neither squarely presented to the IJ nor considered by it, and (ii) the impending marriage in the *Gao* case was a classic arranged marriage as opposed to the forced marriage recognized by the Second Circuit.

In sum, the Petition does not present a significant legal question or error warranting review by this Court.

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[5] The other source cited by the Petitioner focuses on the distinction between marriages arranged for the sole purpose of establishing asylum and forced marriages, not the difference between traditional arranged marriage and forced marriage. See Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 123 (2005).

2. Petitioner Overstates The Scope And Import Of The Decision In This Case.

The Petitioner's contention that the Second Circuit decision must be reversed because of its far reaching implications (Pet. 3) also depends on the incorrect assumption that the Second Circuit was considering a classic arranged marriage, not a forced marriage. As a result, the Petitioner's prediction of the effect is a gross overstatement of both the scope and import of the *Gao* decision.

First, the definition itself – "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable" – does not by its terms apply to arranged marriages throughout the world as the Petitioner implies.[6] Second, the Second Circuit itself expressly limited the scope of its definition of "particular social group" as follows:

> We note, additionally, that our definition of Gao's social group is tailored to the facts of this case

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[6] The Second Circuit's formulation of the particular social group is in line with the formulation by the BIA of those groups it has determined to be cognizable as particular social groups within the meaning of the INA. See, *e.g.*, *In re V-T-S*, 21 I. & N. Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *In re Kasingu*, 21 I. & N. Dec. 357, 365 (BIA 1996) (young women of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, and who oppose the practice); *In re H*, 21 I. & N. Dec. 337, 343 (BIA 1996) (Marchan subclan of Somalis); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (homosexuals in Cuba); *In re Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (former member of the national police of El Salvador). The refugee in each group has common immutable or fundamental characteristics – gender, kinship, sexual preference, or past experience, which is shared with the members of the group and recognizable within a defined community.

> and does not reflect any outer limit of cognizable social groups. We do not here reach, for example, whether young, unmarried women in rural China comprise a "particular social group" under asylum law such that, if they have a well founded fear of being forced into marriage, they are eligible for asylum.

Pet. App. 14a n.6.

Third, Petitioner's policy argument depends upon the assumption that the particular social group determination is the only legal and factual issue standing between applicants and asylum status. However, applicants must also establish that they (i) have been, or face a well-founded fear of (ii) being subjected to harm amounting to persecution (iii) "on account of" one or more of the five statutory grounds. These additional requirements (which encompass numerous subsidiary issues) in each specific application serve to restrict asylum eligibility to a narrow subset of all individuals who can claim they are described by or fall within a protected group. *Li Juan Wang v. United States AG*, 2007 WL 870376, at *3 (2d Cir. March 22, 2007) ("An asylum applicant must show not only that she was a member of a particular social group or that her case falls within one of the other enumerated protected grounds; the 'applicant must also show, through direct or circumstantial evidence, that the persecutor's motive to persecute arises from' the protected ground.") (citations omitted); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (although Iranian women who find restrictive laws against women so abhorrent they refuse to conform may constitute a cognizable social group under asylum law, applicant must satisfy three elements in order to qualify for withholding of deportation or asylum including the identity of

the group, membership in the group and persecution or a well-founded fear of persecution based on that membership); see also *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (holding that recognizing a protected social group of homosexuals in Cuba was not tantamount to awarding relief to all members of that group because each individual must satisfy additional elements of the asylum statute). In the *Gao* case, as in the cases cited above, the Second Circuit remanded multiple dispositive issues for consideration to the BIA, each of which must be resolved in Gao's favor in order for her to be granted asylum or withholding of removal.

Fourth, both the Second Circuit and other circuit courts have denied review of asylum petitions based on membership in the particular social group defined in the *Gao* case for a variety of reasons including the facts of each such case, credibility issues, and asylum considerations other than membership in the particular social group. *Chen v. Gonzales*, 2007 WL 956915, at *2 (7th Cir. March 29, 2007) ("Chen cannot belong to the social group defined in *Gao*, which explicitly limited its social-group definition to the facts of the case, because she was not sold into marriage. But even if we were to assume the existence of a social group of the sort that Chen proposes, and if we were further to assume that Chen belongs to such a group, she would still be ineligible for asylum because she cannot show a well-founded fear that she will be singled out for persecution on that basis in the future"); *Chen v. U.S. Dep't of Justice*, 2007 WL 631748, at *1 (2d Cir. February 26, 2007) (court need not consider petitioner's claim that he would endure hardships as a result of his refusal to enter into an arranged marriage with a village cadre's daughter, which could have been considered one of persecution based on membership in a particular social group based upon *Gao*, because IJ's adverse credibility

finding relating to this issue was supported by substantial evidence); *Hua Lin v. Gonzales*, 205 Fed. Appx. 879, 879 (2d Cir. 2006) (alien's claim that she was sold into a forced marriage was administratively unexhausted and waived).

Finally, Petitioner's suggestion that size of category of potentially eligible members should warrant denial of asylum applications has been rejected by the agency charged with administering the statute. The INS directly addressed the concern that particular social groups would encompass numerically large categories of individuals. A December 9, 1993, legal opinion of the Office of the INS General Counsel provided that:

> The fact that clans may be large, that almost all members of Somali society can claim some clan membership, and that inter-clan conflict is prevalent in Somalia, should not create undue concern that virtually all Somalis would qualify for refugee status. Any applicant for refugee status claiming membership in a particular social group must establish he or she has been persecuted, or may be persecuted, on account of that membership. Thus, while a Somali clan appears to meet the definitional criteria for a particular social group, this is merely the beginning of the inquiry into whether an individual applicant can establish refugee status.

U.S. Dep't of Justice, Immigration and Naturalization Service, Office of the General Counsel, Op. No. 93-91 (Dec. 9, 1993), *available at* 1993 WL 1504038. See also United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a particular social group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 18, U.N. Doc. HCR/GIP/02/02 (May 7, 2002):

> The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society – perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

In sum, there is no pressing need for this Court to review, let alone reverse, the Second Circuit decision based upon an alleged far-reaching effect on immigration law and policy.

CONCLUSION

Based upon the above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CAROLE NEVILLE
Counsel of Record

MICHAEL ROBERT CARNEY
Attorney

SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

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APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of — File A. 77 994 017

GAO, HONG YING, Respondent — IN REMOVAL PROCEEDINGS — Transcript of Hearing

Before CHRISTINE BITHER, Immigration Judge

Date: January 29, 2003 Place: New York, New York

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter: David Leung

Language: Mandarin

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Richard Van Veldhuisen, Esquire	Morry Cheng, Esquire

* * *

[7] JUDGE FOR THE RECORD

Good morning. This is Immigration Judge Christine Bither appearing in New York City on January 24th, 2003, in the matter of Fengling Liu, A 77 994 017.

JUDGE TO MS. CHENG

Q. Counsel, do you –

A. In the matter of Gao Hong Ying.

JUDGE FOR THE RECORD

One moment please while we go off the record.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Back on the record. I was simply looking at an incorrect order. This is the case of Hong Ying Gao, G-A-O, A 77 994 017.

JUDGE TO MS. CHENG

Q. Counsel, would you state your names for the record please.

A. Morry Cheng for the office of Fengling Liu.

Q. And would you spell your name for the record please?

A. M-O-R-R-Y C-H-E-N-G.

Q. Thank you.

MR. VAN VELDHUISEN TO JUDGE

Q. For the Government, Richard Van Veldhuisen, [8] Assistant District Counsel. That's spelled V-A-N V-E-L-D-H-U-I-S-E-N.

A. Thank you.

JUDGE TO MS. CHENG

Q. And, Ms. Gao's best language is what language please?

A. Mandarin.

Q. All right.

JUDGE FOR THE RECORD

We have present in Court today a Mandarin interpreter.

JUDGE TO INTERPRETER

Q. Would you state your name for the record please?

A. David Leung, L-E-U-N-G, Mandarin interpreter.

Q. We would like to swear the interpreter at this time please. Do you swear that you will interpret to the best of your knowledge English into Mandarin and Mandarin into English?

A. Yes, I do.

Q. Thank you. Please be seated. Could we just have the respondent state her name for the record please through the interpreter?

MS. GAO TO JUDGE

Q. My name is Gao Hong Ying.

A. And who is the person seated next to you in the yellow jacket?

Q. That's my defensive lawyer.

[9] A. Do you give her the authority to speak for you today when necessary?

Q. Yes.

A. Have you reviewed your asylum application with your attorney?

Q. I did that.

JUDGE TO COUNSEL

Q. All right, counsel, for the record we're going to go over the Exhibits and enter those that haven't been entered yet.

MS. CHENG TO JUDGE

Q. Your Honor, –

A. Is there anything further?

Q. – I would like to make some corrections on the I-589.

A. And why are you making them the day of the hearing?

Q. Because some of the dates are mixed up.

A. But why wasn't that done before the hearing?

Q. That she just pointed out for us yesterday.

A. All right. Could you give it to me, please. Do you have a copy for the Government?

MR. VAN VELDHUISEN TO JUDGE

Q. She served me with a copy, Your Honor.

A. Thank you.

[10] JUDGE TO MS. CHENG

Q. And what dates are we referring to?

Q. Question number did you change? We're talking about her schools, the dates she attended school. Is that correct?

A. That is correct.

Q. And so on this exhibit your handing me you've just changed those dates?

A. Yes.

Q. All right. Thank you.

JUDGE FOR THE RECORD

We'll mark these into the record just to be clear. All right. We've already marked into the record Exhibit 1, which is the Notice to Appear. We've Marked Exhibit 2 as the change of venue in which Ms. Gao admitted and conceded her deportability.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record. We just clarified that the application for asylum has not been marked as an exhibit. We will mark that as Exhibit 3. And we will mark the one page that was submitted in the Court today, application for asylum, withholding, where the question number 27, the school dates, was corrected as Exhibit 3A. All right. We need to swear the respondent to the truthfulness of this asylum application.

[11] JUDGE TO MS. GAO

Q. Please stand and raise your right hand. Do you swear that the contents of this application are true and correct to the best of your knowledge?

A. Yes.

Q. All right. Now let me remind you that you need to speak up so the tape recorder can pick up your answers. If you nod your head that's not a clear answer. We need to hear a yes or no. Do you understand?

A. Yes.

Q. Is there any reason that you cannot testify truthfully today?

A. Nothing.

Q. You're not on any medications?

A. No.

Q. Now after you filled out this asylum application and you reviewed it with your attorney, did your attorney read your statement to you?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

Now we have some other exhibits here.

MR. VAN VELDHUISEN TO JUDGE

Q. Your Honor, can I just inquire as to the I-589? Did she actually sign on the original part, did she just sign [12] that?

A. On the application?

Q. Yes. On page eight.

A. On the application I have she did sign the original.

Q. Okay. That's all right. I just wanted, on the very bottom?

A. To be completed at the interview, has not been signed. We should sign that today.

Q. I would just ask that she sign it in front of the Court today.

A. All right.

JUDGE TO MS. GAO

Q. Ms. Gao, we're going to have you sign your signature today on the back of this asylum application. By your signature, you're indicating that everything in that application is true.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MS. CHENG

Q. Thank you, counsel.

JUDGE FOR THE RECORD

We have attached to the original asylum application the original packet here, a letter from Ms. Gao's mother. It's not dated, but it says respectful honorable Judge.

[13] JUDGE TO COUNSEL

Q. Counsel, do you both have a copy of that?

A. (Morry Cheng) Yes.

A. (Mr. Van Veldhuisen) Yes, the Service does, yes.

JUDGE FOR THE RECORD

We're going to mark that as Exhibit 4.

JUDGE TO MR. VAN VELDHUISEN

Q. Are there any objections from the Government?

A. Just as to weight, inability to cross-examine the author of the letter.

JUDGE FOR THE RECORD

Objection noted. That will be marked into evidence as Exhibit 4. We also have attached to that Packet, the U.S. Department of State Country Report for China. We'll mark that as Exhibit 5.

JUDGE TO MR. VAN VELDHUISEN

Q. Are there any objections from the Government?

A. No.

JUDGE TO MS. CHENG

Q. Does counsel for the respondent have any further exhibits?

A. No, Your Honor.

JUDGE FOR THE RECORD

Now the Government has also submitted some exhibits in this case. From the Government we have the record of sworn [14] statement that was taken at the airport, signed by Ms. Gao, and dated November 1st, 2001. I'm going to enter that into evidence as Exhibit 6.

JUDGE TO MS. CHENG

Q. Is there any objection from counsel?

A. No, Your Honor.

JUDGE FOR THE RECORD

And we also have Ms. Gao's passport.

JUDGE TO COUNSEL

Q. Any objection form counsel on the passport? From either side?

JUDGE TO MS. CHENG

Q. Well, submitted by the Government so it would be. Counsel for the respondent, do you have any objections?

A. No, Your Honor.

Q. And you have a copy of that?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

We'll mark that as Exhibit 6.

JUDGE TO COUNSEL

Q. Anything further from either side?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) The only thing, that I did receive from counsel and I don't know if this was part of your [15] Exhibit 3, was a notarial birth certificate of the respondent and her household registration. Did you make that part of Exhibit 3?

JUDGE TO MR. VAN VELDHUISEN

Q. It was my intention to make that part of Exhibit 3. That's like a packet that came in.

A. That's fine. I just wanted to clarify, thank you.

Q. Thank you for clarifying that.

A. No objection to those.

JUDGE FOR THE RECORD

Exhibit 3 also includes these documents.

JUDGE TO MS. CHENG

Q. Are we ready to proceed?

A. Yes.

Q. All right.

JUDGE TO MS. GAO

Q. Ms. Gao, what is your best language?

A. Chinese.

Q. And what dialect of Chinese do you understand?

A. Mandarin.

Q. Have you been able to understand what the interpreter is asking you?

A. I understand.

JUDGE TO INTERPRETER

Q. And Mr. Interpreter, have you been able to understand Ms. Gao?

[16] A. I understand.

Q. Okay, I just want to make sure we have the correct interpreter.

JUDGE TO MS. CHENG

Q. All right, counsel, you may proceed.

MS. CHENG TO MS. GAO

Q. What's your birth date?

A. 1980 December 8th.

Q. Are you married?

A. No.

Q. Do you have children?

A. No.

Q. When did you last leave your country?

A. It was in 2001, October.

Q. Do you remember what date?

A. The 27th.

Q. How did you leave your country, by what transportation means?

A. By plane.

Q. When you left your country at airport did you present any passport to government?

A. No.

Q. Did you, how did you get your boarding pass?

A. Someone else obtained on my behalf and then took me inside.

[17] Q. Do you know what the document or passport they, they showed to the government in order to obtain the boarding pass?

A. I don't know. He just gave me the boarding pass.

Q. When did you last enter the United States?

A. 2001 November 1st.

Q. When you entered United States did you present any passport to the U.S. government?

A. I did.

Q. Was that your own passport?

A. No my own passport.

Q. Was your photo in the passport?

A. Yes.

Q. Was your name in the passport?

A. No.

Q. How did you get that passport?

A. Someone else gave it to me.

Q. Why did you come to the United States?

A. I want to come to the United States to apply for political asylum.

Q. Why do you want to apply for political asylum?

A. Because I was forced by the other people to get married. And then the other people wanted to sue me. So I came to the United States.

Q. Would you tell us about what happened. Who wants [18] to force you for marriage?

A. It was a person introduced by a go-between to my family members previously and later I did not want to marry the person and so the person forced me to.

Q. Did that happen?

A. At the time when we engaged it was year 2000. And then in year 2001, when I was about to reach 21 of age, then this incident happened. I was forced to marry.

Q. When were you engaged? Could you tell us the background of the engagement?

A. Yes. It was around year 2000. A go-between refer an individual to my family members and when this go-between introduced this individual to my family member, my mother was satisfied with that person. And so she agreed to it.

Q. And then what happened after she agreed to it?

A. And then they chose a date for the engagement and they received some money for that engagement. By doing so we were considered engaged.

Q. And when was that?

A. It was around year 2000 in July.

Q. Do you remember the date?

A. Because at the time I was not at home and when they received the gifts money I'm not too sure about that, when.

Q. Do you know how much the gift?

A. 18,800.

[19] Q. RMB?

A. Correct.

Q. So, what happened after you were engaged?

A. At first I did not like too much about this engagement. But after being berated by my family members I stated to get along with this person. At first I felt his personality was rather acceptable. And he showed somewhat respect to be. However, after some of the more further understanding the personality, I didn't think he was such a nice person.

Q. So what happened after that?

A. And then I felt that his temperament become very bad and he cursed all the time and he stopped working, and he hang around outside with friends, and he gambled, and he owed people a lot of money.

Q. So, did you do anything about it?

A. Yes, when he changed into that kind of person, I tried to persuade him to look for another job and to pay back the money bit by bit. But he wouldn't listen to me, but he asked me for more money, I didn't have the money so he started to yell at .me and even beat me up.

Q. Then what happened after that?

A. And eventually I didn't want the relationship to develop any further, And I suggested that to cancel the engagement. I didn't want to marry this person. Then he even [20] become worse. He threatened me. He didn't want me to say anything about him. And he asked me for more money. I didn't have the money. So he started to ask money from my family members.

Q. And then what happened after that?

A. And then I did not have the money. He said that since my parents (indiscernible) to get money from him, they should have the money, but when my mother promise him to marry me to him, my mother tried to get the money, to pay back our debt. And so our family didn't really have money and I didn't have the money to give him. So, we had argument all the time. And so I really don't want the relationship to continue. I didn't want to marry.

Q. So, did you take any actions?

A. And so he wouldn't agree to the cancellation of the engagement. And in order to avoid him, I went away to another place to work. I didn't want to see him no more.

Q. What place did you go?

A. I went to work as a cashier at the photo studio at Fuchou, F-U C-H-O-U. M-A-W-E-I District.

Q. And how far is that place from your home?

A. It's about an hour.

Q. By what?

A. By boat.

Q. So, anything happen after you worked there?

[21] A. And then he went to my home several times. He didn't find me. He asked my parents, where did I go. My parents said, they didn't know. He became very angry. He smashed some something an my home and then he left.

Q. And what happened after that?

A. And then in 2001, at that time, because my birthday fell on December and I have to reach 21st in order to get married. So, he spoke to my family members and forced me to marry him by that time.

Q. When you say you have to reach 21st, 21st what? You mean, what, the date, or the year, the age? 21st.

A. (Interpreter) I believe 21st years of age.

JUDGE TO INTERPRETER

Q. Excuse me, interpreter, you have to ask the question as stated by counsel to the witnesses.

A. Your Honor, –

Q. She can clarify that.

A. Okay.

Q. Thank you.

MS. GAO TO MS. CHENG

Q. Twenty one years of age.

A. Thank you. So, what happened after that?

Q. And then I did not go home I'd knew it from my parents. But when he did not find me, he continued to visit my home and to make troubles with my family members, as my mother [22] told me.

A. So, then anything else happened after that?

Q. So, after a period of time something came, I spoke to my mother and I told her that I really didn't want to marry him, and so why don't you arrange for me to leave China.

A. So, then anything else, what happened after that?

Q. And then my mother agreed for me to leave the country upon advise from my paternal aunt. After I left, he came to my home with some other people and said time is almost up. He wanted to see me in person. But my family members said that I was gone. I was gone. I left for a place far away and I would not come back. And later he asked my family members again that if they failed to present me he would summon his paternal uncle to sue my family. Because my family took his money at the time of the engagement and he could sue my family as cheating him for the money. And then I ran away after I took the money.

A. And then what happened after he threatened that?

Q. (Interpreter) After?

A. What happened after –

MR. VAN VELDHUISEN TO INTERPRETER

Q. Just, just for clarification –

A. Excuse me.

Q. Sorry.

Q. Just to clarify something with the interpreter. Did she say that she ran away, she took the money and ran away?

[23] Is that what the interpreter said? I just need to clarify –

MS. GAO TO MR. VAN VELDHUISEN

Q. Because my mother took the money and the money was already returned to someone else and I didn't have the money.

A. Thank you.

MS. CHENG TO MR. VAN VELDHUISEN

Q. Was that what you want?

JUDGE TO MS. CHENG

Q. Excuse me. If you have some comments would you please address them to the Court. You may continue.

A. Sure.

MS. CHENG TO MS. GAO

Q. So, what happened after that?

A. And after that he wouldn't believe I already came to United States and he took a big group of people to create more troubles in my home.

Q. And then what happened?

A. And then he created a big scene to the extent that the neighbors came out to tell him that I already came to United States and would work hard to pay him back the money and I was no longer in China.

Q. After you came to the United States, did you contact your family?

A. Yes.

Q. Whom did you contact?

[24] A. With my mother.

Q. And what did you hear from your mother?

A. My mother said he continued to come but since he couldn't find the person. So, my mother could only try her best to pay him back the money.

Q. And anything else you heard from your mother?

A. For my mother because after he create all this troubles in order to not run into him to often. So, my mother move her residence from time to time.

Q. Did you ever ask your mother to, to give, to give a statement regarding to what happened to you?

A. No, only when we correspond, I told my mother and she mentioned symbol in her message. Sometimes she relies on some other people to send the message.

Q. Why didn't you just relocate to somewhere else in China?

A. Because at that time, many people came to the United States. I thought about going to some other places. But what I heard and saw people coming to the United States and eventually I wanted to come to the United States. And I heard the other people say you could apply for political asylum here.

Q. Do you remember that you were interviewed at airport? Do you remember you were interviewed at airport?

A. What airport? Do you mean in China or where?

Q. In the United States.

[25] A. Yes, at the airport?

Q. On November 1st, 2001?

A. 2001 November 1st at the airport.

Q. Do you remember that you were interviewed on that date?

A. Yes.

Q. Do you remember that you were asked what's the purpose of your visit to the United States?

A. Correct.

Q. Do you remember that you answered, to work and to live?

A. Correct.

Q. And today you told us that you came to United States to apply for political asylum. And how do you reconcile the, the difference?

A. Because at the time when they asked me What did I do when I come to the United States. My understanding was that they were asking what kind of work I'm prepared to do in United States.

MS. CHENG TO JUDGE

Q. I have no more questions.

JUDGE TO MR. VAN VELDHUISEN

Q. Does the Government have any cross?

A. Yes, Your Honor.

MR. VAN VELDHUISEN TO MS. GAO

[26] Q. This arrangement that you had with this matchmaker agency, was it a formal written arrangement?

A. Are you asking whether it involves documents?

Q. Yes.

A. Nothing.

Q. Did you know the go-between person? Did you personally know that person?

A. The Person is just a go-between person, a private individuals in the rural area and the person pays visits everywhere to match boys and girls.

Q. Did you ever meet this person?

A. The go-between, yes.

Q. And was there any, any type of receipt for the money that was exchanged?

A. No. In our area, nothing like that.

Q. Well, what happened to the money that your parents received for this arrangement?

A. The money was paid back to other people.

Q. When you say other people, who are you talking about?

A. It was like previously when we went to school, we did not have enough money to pay. We borrow money from the other people. Or when we were sick, we didn't have the money to see a doctor, and we borrowed money from the other people.

Q. So, your saying you used this money to pay bills, [27] family bills?

A. Correct.

Q. Now in your mother's letter, just for the record Exhibit 4, you said that she promised to return the money to your boyfriend, Did she ever return the money?

A. Up till now, no,

Q. Did she pay any money back to him?

A. Up till now, they have not paid him back because they didn't have enough money and because I sent only a little money back to them and only enough for them to have, make a living.

Q. Now did your parents give you any money to travel to the United States?

A. Yes.

Q. And how much did it cost you to travel to the United States?

A. I'm not, I don't know about that. My mother never want to mention that to me.

Q. But do you know how much it cost? Well, you said that your mother gave you some money to travel to the United States. How much money?

A. Its about 1,000 RMB.

Q. Now, you told us that your boyfriend threatened his family threatened to sue you. Did they ever sue your family?

A. I'm not to sure about that because his paternal [28] uncle did business outside and he knew relatively more government officials and I heard that on one occasion he took with him some people and make arrests for another individuals. And I was somehow concerned and so I left first.

Q. My question was, did they ever, do you know whether they ever sued your family for the money?

A. I don't think they did. He only threatened me.

Q. Now, when you started, did you ever go back to the go-between or the agency when you were having problems with your boyfriend?

A. Because in the beginning the go-between only help you to arrange for the engagement and after that his job is done and he wouldn't care less.

Q. Well, when your boyfriend started to beat you and threaten you, did you go to the police for help?

JUDGE TO MR. VAN VELDHUISEN

Q. Let me just clarify that. I think you've misstated her testimony, counsel. You said when her boyfriend threatened to beat her. I don't believe that's her testimony.

A. I will clarify that.

Q. Would you please clarify?

A. Sure.

MR. VAN VELDHUISEN TO MS. GAO

Q. Did you testify that your boyfriend yelled at you and would beat you up?

[29] A. Correct.

JUDGE TO MR. VAN VELDHUISEN

Q. He threatened to beat her. He did not beat her, as I understand it. Could we please clarify?

JUDGE TO MS. GAO

Q. Did your boyfriend ever beat you?

A. He did.

Q. He physically touched you?

A. What?

Q. Did your boyfriend touch you with hands in a harmful way?

A. He did. Yes.

Q. What did he do?

A. He slapped me because as we talked he asked me for money, I didn't have the money so he just slapped me.

Q. Thank you.

JUDGE TO MR. VAN VELDHUISEN

Q. You may proceed.

MR. VAN VELDHUISEN TO MS. GAO

Q. Did you ever, when you were having problems with your boyfriend, did you ever go to the police or any authorities to ask for help?

A. I did not because I dare not.

Q. Now, you told us that you, you moved away to work as a cashier to Mawei District, correct?

[30] A. Yes.

Q. And approximately when was that?

A. Its around year 2000 December in the winter time.

Q. Was that first time that you worked as a cashier?

A. Correct.

Q. And did you have any problems when your were in the Mawei District with your boyfriend?

JUDGE TO MR. VAN VELDHUISEN

Q. Excuse me. Would you rephrase that question, please?

MR. VAN VELDHUISEN TO MS. GAO

Q. When you were living in Mawei District, did you have any problems with your boyfriend?

A. In the beginning there was some problems because we had argument and I was angry so I left.

Q. Well, did you, how long did you live in Mawei District?

A. It's about half a year.

Q. And did he know that you were living there?

A. At first he did not.

Q. Did you, did you ever tell him that you were living there?

A. I did not.

Q. Do you know how he found out?

A. Because later when I went home I bumped into him [31] and then he followed me when I left to a ferry pier as I boarded the boat and so he find out.

Q. And what problem did you have with him when you were living in Mawei District?

A. And then he knew I was in Mawei. He did not know exactly where I live in Mawei, but he knew I was in Mawei. He threatened my family members. Told them to tell me stop working and came back.

Q. So, he never actually came to where you were living in Mawei District?

A. Correct.

Q. Now, when you gave your statement to the immigration authorities at the airport, on November 1st of 2001, –

A. Yes.

Q. – you told the inspector that the agency was the one that got upset and threatened your mother. Why did you tell them that?

MR. VAN VELDHUISEN TO JUDGE

Q. And for the record I'm just referring to Exhibit 6, page 4.

MS. GAO TO MR. VELDHUISEN

Q. No. I don't recall I did say something like that.

JUDGE TO MR. VAN VELDHUISEN

Q. Counsel, why don't you read the question and [32] answer to her to refresh her memory.

MR. VAN VELDHUISEN TO MS. GAO

Q. Do you recall being asked this question?

JUDGE TO MR. VAN VELDHUISEN

Q. Counsel, why don't you rephrase that? She may not recall.

A. My question is, do you recall being asked this question.

Q. I think she's already –

A. She said she recalls being questioned.

Q. All right. Go ahead. Proceed.

MR. VAN VELDHUISEN TO MS. GAO

Q. The question was, why did you leave your home country.

Q. And your answer was, my mother went into a marriage arrangement a few years ago with an agency in China. Once I got to meet my arranged marriage partner, I did not want to get married to him. I told my mother and she agreed that I should not get married to that man, so she notified the agency. The agency got upset and threatened my mother and me, so my mother decided to get me out of China. Now my question is, why did you tell the immigration inspector that answer?

A. No, because at first when they tried to make the, make the introduction, I had not seen the other person. I was in another place, Mawei, far away and only my mother told me. And [33] so I just make a symbol when I answer those judges and I did not want my mother to get marry, wanted my mother to get me to marry the person. I recall I did not specifically answer that. My mother decided to send me out of country because of that.

Q. Why, in your asylum application and your statement, don't you once mention the name of your fiancé?

A. Because I was not asked and so. I did not say.

MR. VAN VELDHUISEN TO JUDGE

Q. I have nothing further, Your Honor.

JUDGE TO MS. GAO

Q. What is your boyfriend's, I'm sorry. He's not your boyfriend. What was the name of the man that your mother arranged for you to marry?

A. The name is C-H-E-N Z-H-I by phonetics.

Q. Is it true that the agency got upset and threatened your mother when she broke the engagement?

A. I forgot that as to whether my mother told me that I forgot.

Q. So, you don't know whether the agency threatened your mother?

A. I'm not to sure.

Q. All right. Thank you. Did your mother pay money to the agency?

A. Yes.

Q. And how much is that?

[34] A. It's about 500 RMB.

Q. And how much did your mother get from Mr. Chen Zhi for the Marriage?

A. 18,800.

Q. Did you attempt to get a passport in your own name from the Chinese government?

A. Yes.

Q. And what happened when you tried to get the passport?

A. I did not make it in my application. No, no. No, no, I get one based upon my application, but I lost that one. Though I have a photocopy of that passport.

Q. Do you have a photocopy of that passport with you today?

A. I think I did. Let me see.

JUDGE FOR THE RECORD

We'll go off the record while she looks for her passport.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record.

JUDGE TO MS. GAO

Q. Did you find your passport?

A. I couldn't find it now.

[35] Q. You don't have it with you today?

A. Correct.

Q. Do you have at home here in the United States at your home?

A. Because when I obtained my passport based on the application I did make a photocopy of it and my I kept it at home and my mother sent me a copy. But I moved my residence and I could not find the photocopy even though the photocopy was used to be in this envelope.

Q. So, when you said that your passport is at home, do you mean at home in China at your mother's home?

A. No, in United States.

Q. Is your mother here in the United States?

A. No.

Q. Where does your mother live?

A. In China.

Q. Do you have any brothers and sisters?

A. No.

JUDGE TO COUNSEL

Q. Anything further from either side?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) No, Your Honor.

Q. All right. I think we're ready to render a decision.

JUDGE TO MS. CHENG

[36] Q. Counsel, I was going to ask you for some closing arguments, respondent?

A. I'll rest on the record.

Q. And under what theory are You proceeding?

A. I'm sorry?

Q. Under what theory are you claiming that Ms. Gao is eligible for political asylum?

A. Under the political opinion and as well as the social group.

Q. And what political Opinion?

A. Political opinion is that she is not she has no way of protecting, she has no way of being protected by the Chinese government as a result of the circumstance of the, the fiancé and particularly fiancé's uncle who supposed to

have the, the power and the power to put people in jail. And also we claim under the social group that in, in her, in her area that the females marriage being arranged.

Q. All right. Thank you, counsel.

JUDGE TO MR. VAN VELDHUISEN

Q. Government?

A. The Service's position is that she is not eligible for asylum. That the circumstances that she complains of is more of a family problem, family private arrangement that the family made for a marriage. That the mistreatment that she complains of is not, does not rise to the level of persecution, it's not by a [37] government-type of agency, and it's not by a private group that the government is not trying to protect. There's some underlying allegation in her statement that the uncle has some power to arrest her. Although that has not even been, other than that bare statement in her asylum application. Her main concern in her testimony was that the family was going to sue because of this financial arrangement, which is a civil remedy open to the family because they didn't follow through with this arrangement. There has been no evidence that this uncle is in any authority to abuse any type of arrest power that he or, or may not even have. That wasn't developed in this case. Even if the Court was to find that there was some sort of persecution or potential for persecution, there's no nexus here to a social group. The social group potentially being that she's a woman to a harmful marriage arrangement. I would not say that that is a particular social group that is protected under the United States asylum law. And therefore, she fails to meet the definition of refugee. And I ask that the Court deny her application at this time.

Q. Thank you, counsel. All right.

JUDGE FOR THE RECORD

I'm ready to issue a decision.

JUDGE TO INTERPRETER

Q. Mr. Interpreter, could you please take Ms. Gao back and give her a synopsis of what I'm saying so she'll understand?

[38] A. Yes, Your Honor.

Q. Thank you.

JUDGE FOR THE RECORD

And just to be clear, I asked that respondent go up back so that the interpreting does not interfere with the record because I did not want that to be playing over when I'm trying to issue the decision. But the respondent is in the back of the courtroom and will hear my decision.

JUDGE RENDERS ORAL DECISION

JUDGE TO MS. GAO

Q. Ms. Gao, would you please come back to the table, Ms. Gao, the interpreter has been interpreting my decision to you. Do you understand that I have ordered you removed from the United States?

A. Yes.

Q. If you disagree with my decision, you may appeal my decision to the Board of Immigration Appeals. Your Notice of Appeal must be filed with the Board of Immigration Appeals in Falls Church, Virginia. And I'm going to

give you the form today. I'm going to give the form to your attorney as well. This form must be received by the Board within 30 days from today's date. That means that the Board must receive your appeal no later than February 24th, 2003. Do you understand?

A. I understand.

Q. Are you still living at 773 Flatbush Avenue, Third [39] floor, in Brooklyn?

A. No.

JUDGE TO MS. CHENG

Q. Well, counsel –

JUDGE FOR THE RECORD

We should have done this perhaps at the beginning of the hearing, but counsel has served me with a change of address.

JUDGE TO MS. GAO

Q. Is your correct address 3519 88th Street, apartment 1, in Jackson Heights?

A. (No audible response.)

JUDGE TO INTERPRETER.

Q. Mr. Interpreter, do you need to see the address?

A. Oh, sorry.

Q. I'm asking her if her correct address –

MS. GAO TO JUDGE

Q. Yes.

A. And what is your telephone number?

Q. Area code 347, 276 8584.

JUDGE TO MS. CHENG

Q. Counsel, you need to fill that in on this form.

JUDGE TO MS. GAO

Q. And when did you live there?

A. About two months ago.

Q If you move again and you appeal my decision, you [40] must notify the Board of Immigration Appeals of the different address. Do you understand?

A. You mean by mail?

Q. Yes, by mail, I'm going to give you the form today.

A. I understand.

Q. All right. Thank you.

JUDGE TO COUNSEL

Q. Is there any thing further?

A. (Mr. Van Veldhuisen) No, Your Honor.

A. (Morry Cheng) Yes, we reserve the right to appeal.

JUDGE TO MS. CHENG

Q. I'm sorry. Absolutely.

JUDGE FOR THE RECORD

Respondent reserves the right to appeal.

MR. VAN VELDHUISEN TO JUDGE

Q. Final for the Service.

A. All right.

JUDGE FOR THE RECORD

We're going to go off the record for one minute.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record. I am serving a copy of my decision today noting that appeal has been reserved by [41] respondent. And that, that appeal is due no later than February 24th, 2003. And I'm also serving both counsel and Ms. Gao with a packet for, for changing your address and appealing before the Board.

JUDGE TO COUNSEL

Q. Is there any thing further?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) Not from the Service.

Q. All right, Thank you.

JUDGE FOR THE RECORD

End of transcript.

HEARING CLOSED

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

File No. A 77-994-017	)	
In the matter of	)	IN REMOVAL
Gao, Hong Ying	)	PROCEEDINGS
Respondent	)	

APPEAL TO THE BOARD. OF IMMIGRATION
APPEALS FROM THE DECISION OF
THE IMMIGRATION JUDGE

BRIEF ON BEHALF OF
THE APPLICANT-APPELLANT

Respectfully Submitted
Morry Cheng, Esq., Of Counsel
Law Office of Fengling Liu
401 Broadway, Suite 1402
New York, NY 10013
(212) 226-3960

INTRODUCTION

Respondent-Appellant was placed in removal proceedings by United States Government. At hearing on January 24, 2003 in New York City, the Immigration Judge denied the Respondent's application for asylum, withholding of removal and relief under Convention against Torture.

ISSUES PRESENTED

Did the Immigration Judge err in finding that on account of membership in a particular social group the respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change?

Did the Immigration Judge err in finding that respondent failed to establish that she is a refugee and that the government would not protect her?

STATEMENT OF FACTS

Respondent is a 22 year-old female, a native and citizen of the PRC, who came to the. United States on or about November 1, 2001 and filed an application for asylum and withholding of removal on account of membership in a particular social group.

Around year 2000, a go-between in respondent's local village refers an individual, Chen Zhi, to respondent's family member. Respondent's mother was satisfied with him and allowed the go-between to setup a marriage a traditional way. Her mother and go-between chose a date for the engagement and received some money from that engagement in July 2000. Respondent's mother paid 500 RMB, for this arrangement to the go-between. Mr. Zhi, paid 18,800RMB to the go-between to give to respondent's mother. Respondent's mother used that money to pay bills and other family debts. There was no written contract but only oral agreement in traditional way.

At first respondent did not like too much about this engagement. But after being berated by her family members she started to get along with this person. She later discovered that he had a bad temperament. He gambled.

He cursed all the time and he stopped working. The respondent tried to persuade him to pay back his debts, but he refused to do so; and the relationship soured. Mr. Chen Zhi asked for money from the respondent but she did not have the money. He started to yell at her and even beat her up. Mr. Chen Zhi threatened respondent when she tried to cancel the arrangement. He slapped her and refused to cancel the engagement. Mr. Chen Zhi attempted to get his money back, but the respondent's mother could not pay back because she her had spent the money on other family's debts.

In the winter of 2000, respondent went to work as a cashier in a photo studio in Fuzhou City. It was about an hour away by boat from her house. At first, Mr. Chen Zhi went to her mother's house looking for her but could not locate her. He became angry and smashed things. On one occasion the respondent came home to visit her mother, Mr. Zhi followed respondent back on the boat and learned the city she lived. When respondent attempted to cancel the marriage arrangement, Mr. Chen Zhi would not allow it. He came to her mother's house several times. In 2001, because respondent's birthday fell on December, and Chen Zhi spoke to her family members and forced her to marry him when she reaches to 21 years old. When Chen Zhi did not find respondent, he continued to visit her home and to make troubles with her family member. When respondent was unable to terminate the marriage arrangement, and they knew that they could not get protection from government, partly because government does not interfere with this kind of traditional arrangement of marriage inherited from feudal system, also partly because Chen Zhi's paternal uncle was prominent figure and had some connection with local government. Mr. Zhi's uncle had power of

making government arrest people. Therefore, the respondent and her mother decided that she should flee to the Unites States. After respondent left China, Chen Zhi came to her home with some other people and said time was almost up. He threatened her family to present her or he would ask his paternal uncle to sue her family. Mr. Chen Zhi would not believe that she already came to United States. He brought a group of people to create more troubles in her home. Eventually, on one occasion, he created such a disturbance that the neighbors told him that respondent had left for the United States and that respondent would work hard to pay him back the money. After respondent arrived United States, she learned that Chen Zhi continued to come and her mother hae to move her residence from time to time to avoid Mr. Chen Zhi's harassment.

ARGUMENT

The Immigration Judge erred in finding that on account of membership in a particular group, the Respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change. Eligibility for asylum based on membership in a particular social group requires the applicant to show that she will be persecuted because of her membership in a group of persons "all of whom share a common immutable characteristic." The characteristic must be one which the members of the group cannot change, or should not be required to change because it is "fundamental to their identities or consciences." *Matter of Acosta* 19 I&M Dec. 211, 233 (BIA 1985), modified on other grounds, *Matter of Mogharrabi,* 19 I&N Dec, 439 (BIA 1987) *See also Matter of H-,* Interim Decision 3276 (BIA1996) (finding that identifiable shared

ties of kinship warrant characterization as social group). In *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) the court provided additional guidance, holding that in order to prevail on a social group membership claim the individual must: I) identify a group that constitutes a particular social group, 2) establish that she is a member of that group, and 3) show that she would be persecuted based on that membership. Fatin v. INS, supra at 1240.

Pursuant to Acosta and Fatin, the respondent claimed that she belongs a membership of a particular social group: Young women of Fuchow ethnicity, who have not had traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it.

In accordance with Acosta, here, the characteristics of being a "young woman" and a "member of the Fuchow ethnic" cannot be changed. The characteristic of arranged marriages, traditionally by the parents and go-between, is a social norm that the respondent should not be required to change it. *See Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that Iranian women who refuse to conform to the Iranian Government's gender specific laws and social norms may well satisfy the Acosta definition). The characteristic that the government does not interfere with these kind of traditional arrangement, cannot and shall not required to be changed by the Respondent. She feared that she would either be forced to comply with such norms – entering arranged marriage – or would suffer the consequences. The harm which the Respondent will be forced to undergo, is clearly and unequivocally persecution. Forcing someone to engage in conduct which is "physically painful or harmful" is persecution. *See Fatin* Supra. The

Respondent will be forced to enter the marriage with a person that she was slapped, beaten and knew would not be able to live with for rest of her life. As a result, she will suffer persecution from entering the arranged marriage. Hence, the respondent has met the characteristic in Acosta and guidance in Fatin. Thus, the Immigration Judge erred in finding that the Respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change.

Furthermore, the social group category within the refugee definition incorporated into the Act has been recognized as having deliberately been included as a "catch all" for individuals not falling into the first four specifically enumerated categories of political opinion, race, religion, or ethnicity. See Krisin E Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison,* 9 Geo. Immigr. LJ. 137, 145 (1995) (Citing T. Alexander Aleinikoff, *The Meaning of "persecution" on United States Aasylum Law,* 3 Int'l J. Feguhee L. 5, 11 (1991); see also Pamela Goldberg, *Any Place But Home: Asylum in the United States for Women Fleeing Intimate Violence,* 26 Cornell Int'l. L.J. 565, 591-592 (1993) (cited International scholar Atle Grahl-Madsen considers it to be broader than the other categories and to have been added to the Convention precisely to protect against persecution that would arise from unforeseeable circumstances.) This case fails within such category.

As to the second issue, the Immigration Judge erred in finding that the respondent has failed to establish that she is a refugee and that the government would not protect her. To qualify for asylum, an applicant must demonstrate that he or she is a "refugee" within the

meaning of § 1101(a)(42)(A) of 8 U.S.C. §1158(a). Section 1101(a)(42)(A) defines "refugee" as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Here, the Respondent qualities as a refugee because she is outside of her country and is unwilling to return or to avail herself of the protection of her country because i) she has suffered past persecution and ii) has a well-founded fear that if she returns to China, she will be persecuted on account of political opinion and her membership in a particular social group.

While the INA does not provide a precise definition of persecution, the term has been construed as requiring a showing by the alien that harm or suffering will be inflicted upon him/her in order to punish him/her for possessing a belief or characteristic a persecutor sought to overcome. *See Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994) (quoting *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), "The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Mikhael v. INS*, 115 F.3d 299, 303 (5th Cir. 1997). Persecution may also be established by "cumulative, specific instances of violence and harassment toward an individual and his/her family members not only by the government,

but also by a group the government declines to control." *Singh v. INS,* 94 F.3d 1353,1358 (9th Cir. 1996). The Respondent testified that she and her family had been harassed by Mr. Chen Zhi, the future husband by the arrangement. The Respondent was even beaten up and slapped. It has been the Chinese government's policy not to interfere with such marriage arrangement inherited from feudal system. The Respondent also testified that Mr. Chen Zhi's paternal uncle was a prominent figure in the village. He had connection and power to make government arrest people. Mr. Chen Zhi threatened her family to have his uncle sue the Respondent's family. The circumstances that cumulative, specific instances of violence and harassment toward the respondent and her family members by a group the government declines to control, clearly fall within the decision in *Singh v. INS*. Accordingly, the Immigration Judge erred finding that the Respondent failed to establish that she is a refugee and that the government would not protect her.

The Respondent has a well-founded fear of future persecution if she returns to her country because Chen Zhi will continue to his pursuit, will ask his paternal uncle to exercise his influence and will continue to harass the Respondent until she agrees to the marriage. The government will not change its policy of not to interfere with traditional marriage arrangement. Thus, the Respondent has established that she falls within the definition of refugee.

WHEREFORE, Respondent respectfully requests that the appeal in this matter be granted and the Judge's decision not to grant asylum be reversed.

/s/ Morry Cheng

Morry Cheng, Esq., Of Counsel
Fengling Liu, Esq.
Law Office of Fengling Liu
Attorney for Respondent
401 Broadway, Suite 1402
New York, NY 10013; (212) 226-3969

CERTIFICATE OF SERVICE

RE: File No. A77-994-017
in the Matter of: Gao, Hong Ying

I HEREBY CERTIFY that on this 2nd day of July 2003, a true and correct copy of the attached Brief for Appeal was served by first class mail, postage prepaid in a properly wrapped envelop deposited in a depository under the exclusive custody of the US Postal Service in City of New York to:

INS
Litigation, Room 11th Fl
26 Federal Plaza
New York, NY 10278

/s/ Morry Cheng

Morry Cheng, Esq., Of Counsel
Fengling Liu, Esq.
Attorney for Respondent
401 Broadway, Suite 1402
New York NY 10013
(212) 226-3960

APPENDIX C

(Translation)

Respectable Honorable Judge,

How are you? My name is Ai Xian Gao. I am mother of Hong Ying Gao. I swear that the following I am going to say is true and correct.

In July 2000, a matchmaker introduced a person to my daughter, Hong Ying Gao. At first, we felt he was a good young man when that matchmaker introduced him. Later on, we gradually found out that he was a gambler who was lazy, obsessed with eating and had a bad temper. He owed other people a lot of money in his gambling. He quarreled with my daughter time and again. Each time, my daughter told me full of tears. At this time, I felt regret. I felt sorry that I did not find a good young man for her. Later, my daughter proposed to cancel the engagement. He refused. He threatened that he would marry my daughter when she was 21 years old. Otherwise, he would find connections and ask his powerful and rich uncle who was an official in the country government to arrest my daughter. He would charge us for cheating other people's money by canceling engagement. We really did not have other choice. For my daughter's happiness, we let her be smuggled into the United States. Since my daughter left, that scoundrel came to my home for trouble making several times. He asked me to turn my daughter in. He did not believe that my daughter went to the United States. At first, he led a group of people to smash some articles in my home. Thanks to the help of neighbors, they left. We promised him we would return the engagement money to him in a short time. Then, we would give some money as compensation. What could we do? We had no way out. We

had to endure the harassment. We are now trying to hide and borrow around. We hope that we can stop these scoundrels. Therefore, I implore that Honorable Judge of American government gives my daughter a change to let her live and work in the United States. Right now, Chinese government is not good. If my daughter returned to China, she will be sentenced and put into prison. Furthermore, if that scoundrel knows that my daughter comes back, he will surely come again to look for trouble. I implore that you accept my daughter. Here, I show my regards to Honorable Judge and everybody.

Verbal statement (mother): Gao, Ai Xian (signature)

Writer: Gao, Qiao (signature)

I, Gang Wang, hereby certify that I am competent to translate from the Chinese into English, and that the translation is true and accurate to the best of my abilities.

/s/ Gang Wang
Gang Wang